

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

CITY OF LINCOLN, NEBRASKA,	)	4:10CV3030
	)	
Plaintiff,	)	
	)	MEMORANDUM
v.	)	AND ORDER
	)	
WINDSTREAM NEBRASKA, INC.,	)	
	)	
Defendant.	)	
	)	

---

In a final pretrial conference order (filing [141](#) at 12), the parties have agreed to waive a jury trial in this matter. In light of this development, I conclude that the pending *Daubert* motions (filings [123](#), [126](#)) should be denied without prejudice to reassertion at trial.

The district court’s “gatekeeping function” under *Daubert* ensures that expert evidence “submitted to the jury” is sufficiently relevant and reliable, [Bonner v. ISP Technologies, Inc., 259 F.3d 924, 929 \(8th Cir.2001\)](#) (emphasis added), but “[t]here is less need for the gatekeeper to keep the gate when the gatekeeper is keeping the gate only for himself,” [United States v. Brown, 415 F.3d 1257, 1269 \(11th Cir.2005\)](#). Similar reasons support less stringent application of *Daubert* in bench trials. See [Charles Alan Wright, Victor James Gold, 29 Fed. Prac. & Proc. Evid. § 6266, n. 90.2 \(2010\)](#), and cases cited. The “usual concerns of the [*Daubert*] rule—keeping unreliable expert testimony from the jury—are not present in such a setting.” [Metavante Corp. v. Emigrant Sav. Bank, 619 F.3d 748, 760 \(7th Cir.2010\)](#).

[In re Zurn Pex Plumbing Products Liability Litigation 644 F.3d 604, 613 \(8th Cir. 2011\)](#). See also [Penske Truck Leasing Co., L.P. v. Rion, LLC, No. 8:07CV294, 2008 WL 4540178, \\*2 \(D.Neb. Oct. 7, 2008\)](#) (denying *Daubert* motion without prejudice to reassertion at trial where right to trial by jury was waived); [S.E.C. v. Guenther,](#)

395 F.Supp.2d 835, 843 n. 3 (D.Neb. 2005) (discussing *Daubert* motion in context of bench trial).

Accordingly,

IT IS ORDERED:

1. Defendant's motion in limine to exclude the expert testimony of Garth Ashpaugh (filing [123](#)) is denied without prejudice to reassertion at trial.
2. Plaintiff's motion in limine to exclude the expert testimony of Daniel J. Caldwell and Jeffrey L. Pursley (filing [126](#)) is denied without prejudice to reassertion at trial.

August 23, 2011.

BY THE COURT:

*Richard G. Kopf*  
United States District Judge

---

\*This opinion may contain hyperlinks to other documents or Web sites. The U.S. District Court for the District of Nebraska does not endorse, recommend, approve, or guarantee any third parties or the services or products they provide on their Web sites. Likewise, the court has no agreements with any of these third parties or their Web sites. The court accepts no responsibility for the availability or functionality of any hyperlink. Thus, the fact that a hyperlink ceases to work or directs the user to some other site does not affect the opinion of the court.